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Nos. 80-1832, 80-2170, and 80-2171

In the Supreme Court of the United States

OCTOBER TERM, 1982

IMMIGRATION AND NATURALIZATION SERVICE, APPELLANT

v.

JAGDISH RAI CHADHA, ET AL.

UNITED STATES HOUSE OF REPRESENTATIVES, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

UNITED STATES SENATE, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE, ET AL.

ON APPEAL FROM AND WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF ON REARGUMENT OF THE UNITED STATES SENATE, APPELLEE-PETITIONER

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Appellee-petitioner United States Senate moves for leave to file the accompanying Supplemental Brief on Reargument of the United States Senate, for the following reasons:

1. The Court heard arguments in these cases on February 22, 1982. On July 2, 1982, the Court restored these

cases to the calendar for reargument. These cases have been calendared for reargument on December 7, 1982.

2. Since the filing of opening briefs in these cases, the United States Court of Appeals for the District of Columbia Circuit has decided two cases on the constitutionality of provisions for legislative review: *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), *appeals and petitions for certiorari filed*, 50 U.S.L.W. 3896 (U.S. April 29, 1982) (No. 81-2008, etc.); and *Consumers Union of U.S., Inc.* v. *Federal Trade Commission*, No. 82-1737 (D.C. Cir. decided Oct. 22, 1982) (en banc), *notices of appeal filed*, (D.C. Cir. Nov. 4, 1982). In the Federal Energy Regulatory Commission case, the District of Columbia Circuit held that a provision for one-House disapproval of a rule under the Natural Gas Policy Act of 1978 was unconstitutional. In the second case, the District of Columbia Circuit held that a provision for two-House disapproval of a trade regulation rule of the Federal Trade Commission was unconstitutional.

3. The principal basis of these two decisions is that statutory authority for legislative review, whether by one or two Houses of Congress, violates the Presentation Clause. This theory of decision of the District of Columbia Circuit is far broader than the separation of powers basis upon which the Ninth Circuit ruled on section 244 of the Immigration and Nationality Act; that broader theory has enormous implications for legislative and executive accommodations under numerous statutes.

4. The accompanying Supplemental Brief on Reargument provides to the Court historical information with which to evaluate the claim that the Presentation Clause is a basis for generally invalidating provisions for legislative review. In Part I, we describe the intent of the Framers in adopting the second part of the Presentation Clause, Article I, Section 7, Clause 3, which requires that "Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be neces-

sary . . . shall be presented to the President. . . ." In Part II, we describe the historical evolution of legislative review over five major periods and uses during the last fifty years: the Reorganization Acts; World War II and the Postwar Period; Impoundment, War, and National Emergency Powers; Energy; and Rulemaking. The conclusion offered by the Supplemental Brief is that the Court should not accept a sweeping challenge to all legislative review provisions based on the Presentation Clause. We state our reasons why the Court should instead focus on the issue of separation of powers and judge the constitutionality of particular legislative review provisions in their different constitutional and statutory contexts.

5. Rule 35.5 of this Court provides that a party may file a supplemental brief to present intervening matters that were not available in time to have been included in his brief in chief. One of the decisions of the District of Columbia Circuit was issued after the February 22, 1982 argument in these cases; the other was issued after our opening brief and only two weeks before the filing of our reply brief. We are requesting leave to file the accompanying Supplemental Brief, instead of relying exclusively on Rule 35.5, for the reason that the Supplemental Brief contains an extensive presentation of historical material not previously presented by the parties.

WHEREFORE, the appellee-petitioner United States Senate requests leave to file the accompanying Supplemental Brief on Reargument of the United States Senate.

Respectfully submitted,

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INTRODUCTION

The court of appeals, in its opinion invalidating section 244(c)(2) of the Immigration and Nationality Act, held that "the essence of the violation here was the violation of the separation of powers rule" (J.S. 55a). It premised its decision on a view that section 244 establishes a "program of individual adjudicative-type determinations" (J.S. 46a), and it acknowledged that "the practicality of alter-

natives to legislative disapproval in other situations raises difficult questions . . . [which] might present considerations different from those we find here . . . as to the question of separation of powers. . . ." (J.S. 55a) (footnotes omitted).

Since the filing of the opening briefs in this case, the United States Court of Appeals for the District of Columbia Circuit has decided two other challenges to provisions for legislative review.[1] In contrast to the narrow separation of powers holding of the Ninth Circuit, the District of Columbia Circuit has premised its decisions on the view that legislative review statutes violate "Article I, Section 7, . . . by preventing the President from exercising his veto power. . . ." (App. 37a, No. 81-2008). This sweeping view of the Presentation Clause aims indiscriminately at all legislative review provisions. Accordingly, the Court now has before it two approaches to judicial consideration of legislative review which differ markedly in their potential to disrupt the numerous accommodations between the political branches which legislative review has made possible.

This Court should not accept respondents' request that it dismantle in a single stroke an entire system of balancing the extraordinary powers which are part of contemporary governance. It should instead adhere to the sound tradition that it will "not 'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.' "*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Brandeis, J., concur-

[1] *Consumers Union of U.S., Inc.* v. *Federal Trade Commission*, No. 82-1737 (D.C. Cir. decided Oct. 22, 1982) (en banc), *notices of appeal filed*, (D.C. Cir. Nov. 4, 1982); *Consumer Energy Council of America* v. *Federal Energy Regulatory Commission*, 673 F.2d 425 (D.C. Cir. 1982), *appeals and petitions for certiorari filed*, 50 U.S.L.W. 3896 (U.S. April 29, 1982) (No. 81-2008, etc.). *See also* note 72 *infra*. The decision in *Consumers Union* was rendered under a special jurisdictional statute providing that it "shall be reviewable by appeal directly to the Supreme Court of the United States." 15 U.S.C. 57a-1(f)(2) (Supp. IV 1980).

ring). To amplify the reason why this Court should not depart from its settled principles of restraint in constitutional adjudication, we have requested leave to file this supplemental brief to present historical facts relating to the purpose of the Presentation Clause and to the development of legislative review over the past fifty years.

In Part I, we describe the intent of the Framers in adopting the second part of the Presentation Clause, Article I, Section 7, Clause 3, which requires that "Every . . . Resolution . . . to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . . [as] in the Case of a Bill." The Framers' concerns in adopting the Presentation Clause did not extend to foreseeing or forestalling legislative review, but concerned only the methods of enactment of legislation. Thus, in evaluating respondents' sweeping approach, their abstract argument based on the Framers' intent is not sufficient.

In Part II, we address the evolution and functioning of legislative review. The evolution of legislative review shows that it has not served as a means for enactment of new legislation, the concern underlying the Presentation Clause. Rather, it has allowed Congress to delegate extraordinary authority sought by the President and agencies to respond to problems of the Depression, World War II, and the 1970's, while providing a mechanism for assuring democratic accountability for the exercise of that broad authority. When these checks and balances on the exercise of extraordinary governmental power are examined in particular statutes and cases, they will be seen to serve rather than to evade the objectives of separation of powers.

ARGUMENT

I.

IN ADOPTING THE PRESENTATION CLAUSE, THE FRAMERS WERE CONCERNED ONLY WITH THE METHODS FOR ENACTING NEW LEGISLATION, NOT WITH LEGISLATIVE REVIEW PURSUANT TO PREVIOUSLY ENACTED LAW

Much of what respondents say in their sweeping Presentation Clause challenge to all legislative review provisions is accurate but not relevant to the issue in this case. Respondents rely primarily on the Presentation Clause [2] to argue that Congress cannot enact new legislation unless both Houses adopt it and present it to the President for signature or veto. That is not disputed. In using legislative review, however, Congress does not attempt or purport to enact legislation. Legislative review under statutes as diverse as those dealing with war powers, impoundments, national emergencies, and cancellation of deportations shares one fundamental character: the resolutions of disapproval which these statutes authorize the Congress to adopt are not original legislation. Rather, in each instance, Congress acts pursuant to previously enacted legislation, and exercises only the authority provided in that legislation; it does not alter, amend, or change the law.

Respondents suggest that the "very possibility" of legislative review "was for[e]seen and foreclosed by the Framers," INS Brief at 24, when they adopted the Presentation Clause. To support this, respondents quote James Madison's comment during the Constitutional Convention when he made the proposal which led to the adoption of that clause. *Id.* That isolated quote, however, is proffered with no accompanying historical explanation to suggest how it is applicable to legislative review.

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[2] Respondents also rely on other provisions of Article I and the bicameralism principle. All the provisions relied on by respondents concern the same matter: how new legislation is enacted.

In fact, the historical background of the Presentation Clause makes the Framers' actual concerns explicit: the Framers desired to limit the methods for enactment of legislation. This goal arose from their familiarity with different types of legislation, and specifically with the experience under the Pennsylvania Constitution of 1776 with different methods for enacting different types of legislation.[3] The Pennsylvania Constitution prescribed procedural requirements intended to improve legislation: all "bills of [a] public nature" had to be printed after being introduced, and had to lie over until the following session of the legislature before adoption.[4] These printing and layover requirements only applied to "bills." At the time, legislation could also be enacted as a "resolve," which was a form of legislation distinct from the bill.[5] By apply-

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[3] *See* R. Luce, *Legislative Procedure* 555 (1922) (comparing Pennsylvania system and Presentation Clause and concluding that "[d]oubtless this [Pennsylvania system] was in mind when the Federal Constitution was made to read" as the Presentation Clause does).

[4] Pa. Const. Section 15 (1776) provided:

> SECT. 15. To the end that laws before they are enacted may be more maturely considered, and the inconvenience of hasty determinations as much as possible prevented, all bills of public nature shall be printed for the consideration of the people, before they are read in general assembly the last time for debate and amendment; and, except on occasions of sudden necessity, shall not be passed into laws until the next session of assembly; and for the more perfect satisfaction of the public, the reasons and motives for making such laws shall be fully and clearly expressed in the preambles.

[5] *See* L. S. Cushing, *Elements of the Law and Practice of Legislative Assemblies in the United States of America* § 752, at 297 (1856) ("A resolve * * * is the form generally adopted in this country, when adminstrative, local, or temporary laws are to be passed.") The Pennsylvania Constitution alluded to the resolve as the form of emergency legislation in requiring the president and council of the state to "expedite the execution of such measures as may be resolved upon by the general assembly; * * * " Pa. Const. Section 20 (1776).

A contemporaneous report described the power of the Pennsylvania assembly of "proceeding by resolve in all cases" as follows:

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ing the printing and layover requirements to bills without mentioning resolves, the Pennsylvania Constitution apparently intended to allow "urgent temporary legislation"[6] to be adopted as a resolve without such requirements.

Using this method, the Pennsylvania legislature routinely evaded printing and layover requirements through adoption of resolves. "[T]o propose legislation at one session and enact it at the next was found so troublesome that in practice nearly all bills were treated as temporary, and at the ensuing session were declared permanent." [7] A 1784 report of a committee of the Council of Censors, a state body responsible for periodically reviewing the state government's adherence to its constitution, charged that the procedures for enacting legislation had

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> The power however to proceed in that manner seems to have been, clearly, in the view of the convention, as it is, by the 20th section of the constitution, made the express duty of the Executive Council to forward the execution of their resolves. The words are, and they are remarkable, "they are to take care that the laws be duly executed; they are to expedite the execution of such measures, as may be resolved upon by the General Assembly." *There is, in the same sentence, a plain distinction taken betwixt laws and resolves*—indeed, they are contradistinguished. The Executive Council are to execute the laws.—They are to expedite the execution of measures resolved upon by the Assembly.—The power of proceeding by resolve is then clearly acknowledged.

Journal of the Second Session of the Council of Censors (August 30, 1784) (emphasis supplied) (minority report of a committee whose role is discussed below on this page). Other contemporary state constitutions also referred to resolves. *See* Va. Const. (1776) ("no reprieve or pardon shall be granted, but by resolve of the House of Delegates"); Delaware Const. Art. 7 (1776) (same); N.C. Const. Art. XLV (1776) ("any member of either House of General Assembly shall have liberty to dissent from, and protest against any act or resolve"). State constitutions similarly distinguished between "bills" and "ordinances." *See* Ga. Const. Arts. XXVII, XXVIII (1777); S.C. Const. Art. VII (1776).

[6] A. Nevins, *The American States During and After the Revolution* 152 (1969).

[7] A. Nevins, *supra* note 6, at 152.

been evaded through the adoption of resolves instead of bills, by the following mechanism:

> [T]he exercise of a power, assumed by the General Assembly to make laws and to alter laws, and to appropriate the lands, goods and money of the commonwealth by RESOLVE only, which so far from being published for consideration, and deferred to the next session, is passed secretly and immediately.[8]

Three years after the committee published its report, the federal Constitutional Convention assembled. On August 15, 1787, during the debate on the President's veto, a delegate from Pennsylvania, Gouverneur Morris, reminded the Convention of the dangers pointed out by the "report of the council of censors in Pennsylvania." [9] After the Convention finished debating the size of the Congressional vote required to overrule a veto, Madison made the motion that led to the Presentation Clause. Madison's subsequent writings in *The Federalist* show that he knew of the Council of Censors report,[10] and that Madison agreed with the report's finding that through adoption of resolves instead of bills, "the precautions chiefly relied on by the [Pennsylvania] constitution against improper acts of the legislature" had been evaded.[11]

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[8] *A Report of the Committee of the Council of Censors. . . .* 13 (1784) (original in italics). In the committee's report, "a multitude of violations of the section which demanded that all bills not introduced under stress of an emergency should be held over for vote by the following Assembly, and meanwhile be printed for public consideration, were alleged." A. Nevins, *supra* note 6, at 190.

[9] 5 J. Elliott, *Debates on the Adoption of the Federal Constitution* 430 (1974 ed.).

[10] *See* J. Madison, *The Federalist* No. 50, at 353 (Wright ed. 1974). This Court has recognized the relevance of the Council of Censors report in interpreting the Constitution. *See Powell* v. *McCormack*, 395 U.S. 486, 529–30 (1969).

[11] J. Madison, *The Federalist* No. 48, at 346 (Wright ed. 1974). Madison explained:

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Therefore, Madison offered his proposal which prevented the problem, decried by the Council of Censors, of enacting resolves without following the procedure for enacting other legislation:

> Mr. MADISON, observing that if the negative of the President was confined to *bills,* it would be evaded by acts under the form and name of resolutions, votes, &c., proposed that "or resolve" should be added after *"bill"* in the beginning of section 13, with an exception as to votes of adjournment, &c.[12]

At first, Madison's proposal to make resolves part of the regular enactment process was rejected. The following day his proposal was redrafted as the Presentation Clause and accepted.[13]

Madison's offer of the proposal which became the Presentation Clause reflected the specific concern of the Framers that there be only one method for the enactment of legislation. There is no evidence that the Framers' concerns in adopting the Clause went beyond enactment of legislation, or that the Framers sought to forestall, or even foresaw, legislative review disapproval resolutions, all of which draw their authority from acts passed in compliance with the Presentation Clause.

Moreover, the Congress has been faithful to the requirement that legislation in the form of resolutions be presented to the President. The War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973), was a joint resolution of the Congress which had been presented to the President and vetoed by him. It became law only after it was repassed by two-thirds of each House as required by

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> A great number of laws had been passed [in Pennsylvania], violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the constitution against improper acts of the legislature.

Id.

[12] 5 J. Elliott, *supra* note 9, at 431 (emphasis in original).

[13] *Id.* (referring to redrafting by E. Randolph).

Article I, Section 7, Clause 3. 87 Stat. 559-60 (1973). Pursuant to the War Powers Resolution, the Congress may by concurrent resolution direct the President to remove the armed forces of the United States from foreign hostilities to which they have been committed in the absence of a declaration of war or specific statutory authorization. Section 5(c) of the War Powers Resolution, 50 U.S.C. 1544(c); see pages 21-24 *infra* (legislative history of provision). While the form of the congressional action is a concurrent resolution, the legal obligation of the President to comply with the action of the Congress is created by the joint resolution, which has been enacted into law in accordance with the Presentation Clause. The Presentation Clause demands no more.

II.

THE EVOLUTION OF LEGISLATIVE REVIEW SHOWS THAT ITS FUNCTION HAS BEEN TO PRESERVE THE BALANCE OF THE ELECTED BRANCHES

The evolution of legislative review over the past five decades shows that its most important function has been to avoid or restrain broad delegations of authority to the President or agencies; it has not served to enact legislation outside the constitutional process. In delegating authority to the President or an agency, Congress faces a fundamental dilemma. Delegation of broad authority runs counter to the basic democratic tenets of our system of government. The nondelegation doctrine sums up those basic tenets: broad delegations of power must be controlled so "that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people." *Arizona* v. *California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part). When Congress delegates broad powers over reorganization, war, budgets, energy or regulation, the electorate can no longer hold Congress responsible for the exercise of those powers, and it thereby risks unaccountable national policymaking. Accordingly, like this

Court,[14] Congress looks on broad delegation with disfavor.

On the other hand, as discussed below, since the 1930's Congress has faced unprecedented national problems, necessitating delegation of broad authority. The evolution of legislative review constitutes a history of those problems, because Congress and the President turned to legislative review to deal with them. Legislative review developed initially in response to the problems of reorganizing the sprawling government structure created in response to the Depression. Such review received its most thorough constitutional consideration by Congress at that time. Subsequently, legislative review was used to respond to the problems of waging World War II, and of postwar national security. Similarly, in the 1970's Congress used legislative review to respond to broad Presidential claims of war, impoundment, and national emergency powers, and to deal with the energy crisis. Finally, Congress has experimented with legislative review to solve the problem of broad delegations of rulemaking authority.

Our analysis of the history of legislative review proceeds through each of the five main historical contexts of such review, looking at three aspects of that history. First, it examines the function of legislative review as the counterpoint to broad authority sought or claimed by the President. Second, it examines the Executive's position, to determine whether legislative review has resulted from accommodation by the elective branches to practical prob-

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[14] *See Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607, 646 (1980) (plurality opinion) (noting danger of statutory construction that delegates sweeping authority); *id.* at 685-87 & nn. 6-7 (Rehnquist, J., concurring) (citing commentary on nondelegation doctrine); *American Textile Manufacturers Institute* v. *Donovan, Inc.*, 452 U.S. 490, 543 (1981) (Rehnquist, J., dissenting).

lems.[15] Third, it examines consideration in Congress of constitutional issues.[16]

A. REORGANIZATION ACT

When Congress enacted and the President approved the Reorganization Act of 1939, they established the chief model for legislative review provisions on the basis of extensive consideration of the delegation problem and other constitutional issues. President Hoover requested authority to reorganize the government in 1929. From the outset, President Hoover coupled his request that the "Congress be willing to delegate its authority over the problem (subject to defined principles) to the Executive" with a proposal for legislative review.[17] Congress followed President Hoover's suggestion and authorized reorganization subject to legislative review; this authority, as amended, lapsed in 1935.[18] In 1936, President Roosevelt created a

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[15] *Compare United States* v. *Midwest Oil Co.*, 236 U.S. 459, 473 (1915) (discussing importance of the history of a practice and acquiescence in it in judging constitutionality), *and Nixon* v. *Administrator of General Services*, 433 U.S. 425, 445 (1977) (reviewing statutory precedent for challenged provision), *with Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 611-13 (1952) (Frankfurter, J., concurring) (describing lack of precedent for challenged action).

[16] *See, e.g., Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (importance of prior Congressional consideration of constitutional issue).

[17] He proposed that the Executive "should act upon approval of a joint committee of Congress or with the reservation of power of revision by Congress within some limited period adequate for its consideration." Pub. Papers 432 (1929).

[18] The initial authority was provided in an appropriation act. Act of June 30, 1932, ch. 314, Section 407, 47 Stat. 382, 414. In 1933, the Attorney General issued an opinion on another statute which stated that the legislative review provision for reorganizations was unconstitutional. 37 Op. Att'y Gen. 56 (1933), *cited in* INS Brief at 58 n. 37. Subsequently the Department of Justice disavowed the opinion. See note 38 *infra*.

In 1933, Congress revised the reorganization authority and provided for it to expire in 1935, this time without legislative review. *See* Fisher & Moe, *Delegating with Ambivalence: The Legislative Veto and Reorganization Authority*, in Subcomm. on Rules of the House, 96th Cong., 2d Sess., *Studies on the Legislative Veto* 174-82 (Comm. Print 1980).

Committee on Administrative Management to study the problems created by the superimposition of newly formed agencies on the pre-existing government structure. That committee concluded that there was "a headless 'fourth branch' of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers." [19]

To deal with this problem, the Administration requested revival of reorganization authority without legislative review, [20] posing an acute problem of broad delegation. Reorganization authority involved major policy decisions about what agencies should exist and which powers should be coordinated or separated. Congressional opponents attacked the proposed reorganization bill as an unconstitutional delegation of legislative authority to the President which would afford him virtually dictatorial power. [21] Concerns regarding the breadth of delegation were reflected when this Court heard challenges to the prior reorganization authority. [22]

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[19] *Report of the President's Committee on Administrative Management* (1937), *reprinted in* S. Doc. No. 8, 75th Cong., 1st Sess. 67 (1937) (referring to independent regulatory commissions).

[20] In 1937 the committee's draft bill to renew the President's reorganization authority was introduced in the Senate. Fisher & Moe, *supra* note 18, at 186. For descriptions of the legislative development of the Reorganization Act, see D.G. Morgan, *Congress and the Constitution: A Study of Responsibility* 184-200 (1966); R. Polenberg, *Reorganizing Roosevelt's Government: The Controversy Over Executive Reorganization, 1936-1939* 125-87 (1966).

[21] *See, e.g.*, 83 Cong. Rec. 4599 (1938) (Rep. Lord). Charges concerning "dictatorship" were so frequent that President Roosevelt prepared a letter which was reprinted in the Congressional Record:

> My Dear ———: Many thanks for your letter telling me that you are concerned over the charges in several newspapers that the reorganization bill now before the Congress would make me a dictator.
>
> (1) As you well know I am as much opposed to American dictatorship as you are. . . .

83 Cong. Rec. 4487 (1938).

[22] In two cases the Court avoided ruling on challenges "that Congress was without constitutional power to delegate to the President au-

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In 1938, after extensive debate on the breadth of the delegation, the House rejected President Roosevelt's request for reorganization authority. The President then dropped his initial resistance to legislative review.[23] In 1939, Congress again debated the constitutional issues implicated by reorganization authority and legislative review. It attempted to apply this Court's decisions on delegation, and considered various constitutional arguments for approval or disapproval of reorganization authority by simple, concurrent, or joint resolution.[24] Ultimately, Congress found in legislative review the means to make a delegation of power to the President consistent with the responsibility of the Congress for the organization of the government.

Commentators hailed the Reorganization Act's legislative review provision as offering a practical and constitutional alternative to otherwise unduly broad delegation.[25] In the following forty-two years, reorganization authority

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thority to determine whether the transfer [of certain functions by reorganization] should be effected," *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 301 (1937), on the ground that Congress had ratified the challenged reorganizations by subsequent legislation. *Id.*; *Isbrandtsen-Moller Co.* v. *United States*, 300 U.S. 139, 148 (1937).

[23] Fisher & Moe, *supra* note 18, at 189–92; Polenberg, *supra* note 20, at 185.

[24] *See, e.g.*, 84 Cong. Rec. 2307–08 (1939) (Rep. Taber) (contrasting disapproval by one House with disapproval by two Houses); *id.* at 2310 (Rep. Warren) (discussing 1933 Attorney General opinion that legislative review provision in 1932 reorganization authority was unconstitutional); *id.* at 2385 (Rep. Van Zandt) (contrasting affirmative approval by Congress with disapproval); *id.* at 2411 (Rep. Dirksen) (discussing Attorney General opinion); *id.* at 2477 (Rep. Cox) (discussing Attorney General opinion); *id.* (Rep. Taber) (reciting Presentation Clause); *id.* at 2479 (Rep. Cox) (discussing Supreme Court decision in *Currin* v. *Wallace*, 306 U.S. 1 (1939)). An amendment to substitute disapproval by either House, for disapproval by both Houses, was adopted in the House Committee of the Whole, 176–155, *id.* at 2500, but rejected by the full House, 193–209, *id.* at 2502.

[25] E. S. Corwin, *The President: Office and Powers 1787–1948* 158 (1948); Millett & Rogers, *The Legislative Veto and the Reorganization Act of 1939*, 1 Pub. Admin. Rev. 176, 178 (1941).

was renewed by statute numerous times.[26] During that period the provision was used extensively. Presidents submitted 115 reorganization plans to Congress of which 23 were disapproved by Congress pursuant to legislative review provisions. See Appendix A (tabulation of disapproval resolutions). Major plans which were not disapproved and became effective included those creating the Executive Office of the President in 1939, the Department of Health, Education and Welfare in 1953, and the Office of Management and Budget in 1970.[27]

B. WORLD WAR II AND THE POSTWAR PERIOD

Shortly after adoption of the Reorganization Act of 1939, Congress and the President applied the legislative review procedure devised in it to resolve the delegation problem for national security.[28] In 1941, President Roosevelt asked Congress to authorize lending or leasing of war materials to foreign governments, and to extend indefi-

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[26] Reorganization Act of 1949, Pub. L. No. 81-109, Section 6, 63 Stat. 203, 205; Pub. L. No. 83-3, 67 Stat. 4 (1953); Pub. L. No. 85-286, 71 Stat. 611 (1957); Pub. L. No. 87-18, 75 Stat. 41 (1961); Pub. L. No. 88-351, 78 Stat. 240 (1964); Pub. L. No. 89-43, 79 Stat. 135 (1965); Pub. L. No. 89-554, Section 906, 80 Stat. 378, 396 (1966); Pub. L. No. 91-5, 83 Stat. 6 (1969); Pub. L. No. 92-179, 85 Stat. 574 (1971); Pub. L. No. 95-17, Section 906, 91 Stat. 29, 32 (1977); Pub. L. No. 96-230, 94 Stat. 329 (1980). After 1949, reorganization statutes provided for disapproval of reorganization plans by one House. The Congress has under consideration President Reagan's request for the renewal of reorganization authority. *See Reorganization Act of 1981: Hearing Before the Senate Comm. on Governmental Affairs*, 97th Cong., 1st Sess. on S. 893 at 2-3, 6-7 (1981).

[27] Reorg. Plan No. 1 of 1939, *reprinted in* 53 Stat. 1423 (Executive Office); Reorg. Plan No. 1 of 1953, *reprinted in* 67 Stat. 631 (HEW); Reorg. Plan No. 2 of 1970, *reprinted in* 84 Stat. 2085 (OMB).

[28] "The world turmoil that led to World War II occasioned the need to transfer greater authority to the president in the areas of foreign affairs and national security. The legislative veto was included in statutes conferring additional authority to constrain presidential initiative." B.H. Craig, The Legislative Veto: Its Implications for Administration and the Democratic Process 58 (unpublished University of Connecticut Ph.D. dissertation 1982).

nitely the period of compulsory military service to prepare for the possibility of war.[29] Both of these steps involved the delegation of broad authority, and Members of Congress charged that the delegation sought was excessive.[30] To resolve this problem, Congress enacted both measures with legislative review provisions that allowed Congress to terminate the delegated authority by concurrent resolution.[31]

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[29] An Act to Promote the Defense of the United States, ch. 11, 55 Stat. 32 (1941); Service Extension Act of 1941, ch. 362, 55 Stat. 626. An earlier statute, the Neutrality Act of 1939, ch. 2, 54 Stat. 4, had authorized either the President, or Congress by concurrent resolution, to embargo exports to belligerents.

[30] The Lend-Lease Act was criticized on the ground that the President wanted "and we yield power in his own discretion, on his own terms, and as he may see fit, to conduct undeclared war anywhere in the world." 87 Cong. Rec. 1269 (1941) (Sen. Clark). The authority to extend the military service period was criticized on the ground that "there is no language limiting the maximum time of service. It is then a question—and I think a serious one—as to whether the President, while his authority exists, may not extend the period of service absolutely indefinitely. . . ." 87 Cong. Rec. 6504 (1941) (Sen. White).

[31] Section 3(c) of an Act to Promote the Defense of the United States, 55 Stat. 32 (1941); Section 2 of the Service Extension Act of 1941, 55 Stat. 626.

In 1953, Justice Jackson published a memorandum signed by President Roosevelt which stated the President's belief that the termination provision of the Lend-Lease act was unconstitutional. At the time President Roosevelt wrote the memorandum, Justice Jackson was serving as Attorney General and the President committed the private memorandum to his care without communicating his views to the Congress. Justice Jackson wrote:

> But was it unconstitutional? That was a different question, which we discussed over and over. The question on which my doubts were not fully satisfied never bothered the President in the least. It seemed to me to depend on whether the provision was to be considered as a reservation or limitation by which the granted power would expire or terminate on the contingency of a concurrent resolution or was to be regarded as authorizing a repeal by concurrent resolution.

Jackson, *A Presidential Legal Opinion*, 66 Harv. L. Rev. 1353, 1355 (1953).

After the United States entered World War II, Congress enacted over thirty statutes conferring powers on the Executive with similar legislative review provisions.[32] The Administration submitted draft bills containing such provisions and affirmed their constitutionality in a legal memorandum.[33] Congressional critics charged that the provisions violated the Presentation Clause.[34] Both the critics who challenged such provisions, and the Administration, which defended them, agreed that their precedent was in the Reorganization Act; debate focused on the critics' attempts to distinguish these provisions from the Reorganization Act on narrow grounds.[35]

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[32] *See* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 Calif. L. Rev. 983, 1089–90 (1975) (listing statutes). A contemporary political scientist explained the crucial role of legislative review provisions in the debates of this period:

> Termination by concurrent resolution is more likely to be provided in measures whose passage on a preliminary survey, appears doubtful. Without this provision, the Service Extension Act of 1941 would probably not have received even the 203 to 202 vote by which it passed the House.

White, *Executive Responsibility to Congress Via Concurrent Resolution*, 36 Am. Poli. Sci. Rev. 895, 898 (1942) (footnotes omitted).

[33] White, *supra* note 32, 36 Am. Poli. Sci. Rev. at 895 n. 2 (submission of draft bills); General Counsel to the Office of Price Administration, *Statement on Constitutionality of Concurrent Resolution Provision of Proposed Price Control Bill* (H.R. 5479) *("Statement on Constitutionality"), reprinted in Price-Control Bill: Hearings Before the House Comm. on Banking and Currency on H.R. 5479*, 77th Cong., 1st Sess. 983 (1941) *("Price Control Hearings")*. *See Allen* v. *Grand Central Aircraft Co.*, 347 U.S. 535, 542 n.7 (1954) (quoting provisions of wartime price control act).

[34] *See Price Control Hearings, supra* note 33, at 399, 634 (Presentation Clause quoted by Rep. Patman); 88 Cong. Rec. 781, 784 (1942) (Sen. Murdock) (same).

[35] *Compare* 87 Cong. Rec. 735 (1941) (Rep. Dirksen) (citing Reorganization Act in support of proposal to include legislative review provision in Lend-Lease Act) *with Price Control Hearings, supra* note 33, at 400, 635 (Rep. Wolcott) (distinguishing legislative review functioning under the Reorganization Act as "condition precedent" from wartime legislative review functioning as "condition subsequent") *and* 87 Cong.

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The Administration's legal memorandum justified legislative review provisions as constitutional on two principal grounds. First, it said that "[i]t has never been thought that article I, section 7, is applicable to every kind of action by the two Houses of Congress." *Statement on Constitutionality, supra* note 33, at 983. Second, it noted that the legislative review provision "is submitted to the President at the time the bill is originally passed, and he then has a chance to approve or disapprove. . . . [T]here is no constitutional requirement that the President give his approval more than once in the present situation." *Id.* at 984.

The use of legislative review before and during World War II established it as "a device that both the Congress and the Executive have repeatedly found valuable in reaching their own compromises over the form and content of delegations of authority. And that is the key point: both branches have found the legislative veto a realistic way of resolving practical issues in their relations."[36] President Roosevelt's "acquiescence in the use of concurrent resolutions during the war was continued by President Truman and his successors. . . . and has become fairly common, with only occasional presidential protest."[37]

Over the following quarter of a century after World War II, Presidents continued to accept legislative review as constitutional. After a decade of experience with legislative review, the administration of President Truman endorsed its constitutionality in 1949 with a Justice Department opinion rejecting the argument that legislative

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Rec. 1596 (1941) (Sen. Murdock) (same). The Administration rejected this attempt to distinguish the Reorganization Act. *See Statement on Constitutionality, supra* note 33, at 985.

[36] J. L. Sundquist, *The Decline and Resurgence of Congress* 356 (1981).

[37] Watson, *supra* note 32, 63 Calif. L. Rev. at 1016.

review was equivalent to enactment of new legislation.[38] The pattern set by the Truman Administration continued through the administrations of four succeeding Presidents until President Nixon vetoed the War Powers Resolution in 1973.

During the intervening years, Presidents regularly denounced provisions by which Congressional *committees* reviewed Executive activity as an unwarranted intrusion. However, respondents have not cited any instance during those administrations, and we know of none, in which any of the five Presidents formally disputed the constitutionality of legislative review provisions except for committee review provisions.[39] Rather, as the Senate Sub-

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[38] Department of Justice, *Memorandum Re Constitutionality of Provisions in Proposed Reorganization Bills Now Pending in Congress* (S. 526 and H.R. 2361, 81st Cong., 1st Sess.), *reprinted in Reorganization Act of 1949*, S. Rep. No. 232, 81st Cong., 1st Sess. 19–20 (1949). This memorandum disapproved part of the Attorney General's 1933 opinion which had termed legislative review unconstitutional, see note 18 *supra*, as "obiter dictum" which had been "based upon an unsound premise." *Id.* at 19.

[39] The INS Brief, at 57 n.37, asserts that there is a history of presidential opposition to legislative review. It cites Watson, *supra* note 32, 63 Calif. L. Rev. at 988 n.9, who lists sixteen Presidential statements by Presidents from Truman through Nixon, and the INS Jurisdictional Statement in this case, at J.S. 22 n.19, which cites a single statement by each President from Truman through Nixon, each of which is among the sixteen cited by Watson.

Every one of these Presidential statements, until the veto by President Nixon of the War Powers Resolution, concerned bills authorizing *committee* review. President Truman: 97 Cong. Rec. 5374–75 (1951) (review by Armed Services committees); 98 Cong. Rec. 9752 (1952) (Post Office and Civil Service, and Public Works, committees). President Eisenhower: 100 Cong. Rec. 7135 (1954) (Armed Services committees); 101 Cong. Rec. 10459–60 (1955) (Appropriations committees); 102 Cong. Rec. 12959 (1956) (Armed Services committees); Pub. Papers 648–50 (1956) (Interior committees); H.R. Doc. No. 255 Pt. I, 86th Cong., 2d Sess. at M18 (1960) (Armed Services committees). President Kennedy: Pub. Papers 6 (1963) (Appropriations committees). President Johnson: Pub. Papers 861–62 (1964) (Interior committees); Pub. Papers 1249–51 (1964) (Agriculture committees); 1 Weekly Comp. Pres. Doc. 132 (1965)

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committee on Separation of Powers found in 1969, "an accommodation was reached years ago on legislative vetoes exercised by the entire Congress or by one House, [while] disputes have continued to arise over the committee form of the veto." S. Rep. No. 549, 91st Cong., 1st Sess. (1969).[40]

In fact, Presidents Kennedy, Johnson, and Nixon actually proposed enactment of statutes with legislative review provisions in such diverse areas as withdrawal of wilderness areas, agricultural programs, taxation, federal grants, and international trade, as well as in reorganization.[41] When the constitutionality of such provisions was

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(Armed Services committees); 1 Weekly Comp. Pres. Doc. 432–33 (1965) (Public Works committees); 111 Cong. Rec. 12639–40 (1965) (Public Works committees). President Nixon: 8 Weekly Comp. Pres. Doc. 938 (1972) (Public Works committees); 8 Weekly Comp. Pres. Doc. 1076 (1972) (Public Works committees); 9 Weekly Comp. Pres. Doc. 1285–87 (1973) (War Powers Resolution).

Many of these disputes concerned a particular issue that was successfully resolved in 1972. A number of statutes provided that "no appropriation may be made" for a particular kind of public work until it had been authorized by the proper committees. Various Presidents disputed whether such provisions were part of the internal Congressional process for authorizing appropriations, or were interference with the Executive. In 1972, President Nixon concluded that they were constitutional, ending the dispute. "The Congress regards this 'no appropriation may be made' provision, I understand, as internal Congressional rule-making not affecting the executive branch, and this Administration has acquiesced in that construction." 8 Weekly Comp. Pres. Doc. 938 (1972).

[40] Even Watson, whose article challenges the constitutionality of legislative review, concedes that "[i]n marked contrast to executive acquiescence to the use of resolutions, Presidents since Roosevelt have vigorously opposed use of the committee veto." Watson, *supra* note 32, 63 Calif. L. Rev. at 1017.

[41] *See National Wilderness Preservation Act: Hearings Before the Senate Comm. on Interior and Insular Affairs on S.4,* 88th Cong., 1st Sess. (1963) (President Kennedy's proposals for legislative review of withdrawal of wilderness areas); Pub. Papers 6 (1961) (President Kennedy's proposals for legislative review of agricultural programs); *President's Message to the Congress Transmitting the Budget for Fiscal Year 1970,* 5 Weekly Comp. Pres. Doc. 70, 73 (Jan. 15, 1969) (President Johnson's proposals for legislative review of taxation); page 36 *infra* (Presi-

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questioned, the administration of President Kennedy submitted a memorandum supporting the constitutionality of legislative review.[42] During the administration of President Johnson, the Department of Justice again affirmed the constitutionality of the legislative review provision of the Reorganization Act, as contrasted with provisions for committee review.[43]

Legislative review served two chief functions in this quarter-century period. In the area of national security, legislative review provisions balanced delegations of authority in legislation addressing the Truman Doctrine, the Korean War, the Middle East Crisis of 1957, and the Vietnam War.[44] Also, in areas of novel policy initiatives, legislative review provisions balanced delegations of authority for the space program, international agreements on nuclear energy, tariff arrangements, and adjustment

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dent Nixon's proposals for legislative review of federal grants); *President's Message to the Congress Proposing Enactment of the Trade Reform Act of 1973*, 9 Weekly Comp. Pres. Doc. 343, 347 (1973) (President Nixon's proposals for legislative review of international trade agreements on non-tariff barriers).

[42] *See* General Counsel of the Department of Agriculture, *Constitutionality of Title I of H.R. 6400, 87th Cong., 1st Session* (1961), *reprinted in Legislative Policy of the Bureau of the Budget: Hearing Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 89th Cong., 2d Sess. 27 (1966).

[43] *See Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 206 (1967) (testimony of Frank M. Wozencraft, Assistant Attorney General for the Office of Legal Counsel).

[44] Assistance to Greece and Turkey, Pub. L. No. 80-75, Section 6, 61 Stat. 103, 105 (1947) (Truman Doctrine); Universal Military Training and Service Act, Pub. L. No. 82-51, Section 1(j), 65 Stat. 75, 80 (1951) (conscription during Korean War); Resolution to Promote Peace and Stability in the Middle East, Pub. L. No. 85-7, Section 6, 71 Stat. 5, 6 (1957), 22 U.S.C. 1965 (Middle East Crisis of 1957); H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, Section 3, 78 Stat. 384, 385 (1964) (Tonkin Gulf Resolution), *repealed*, Pub. L. No. 91-672, Section 12, 84 Stat. 2053, 2055 (1971). *See* Buckwalter, *The Congressional Concurrent Resolution: A Search for Foreign Policy Influence*, 14 Midwest J. Poli. Sci. 434 (1970).

of federal pay rates.[45] This last provision was challenged as unconstitutional and upheld. *Atkins* v. *United States,* 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied,* 434 U.S. 1009 (1978).

C. IMPOUNDMENT, WAR, AND NATIONAL EMERGENCY POWERS

During the 1970's, the President and Congress resolved a series of major constitutional disputes over claims of the President to broad impoundment, war, and national emergency powers. Although each dispute and its resolution evolved separately, all arose from a single dilemma: the President's claim that broad powers were needed to deal with modern problems of budget control and foreign affairs, coupled with the recognition that broad powers must be checked. These confrontations tested the ability of the elective branches to adapt to modern problems within the limits of the Constitution. In seeking to reconcile broad power with accountability, the elective branches turned to legislative review, with its history of acceptance by President and Congress as a solution to similar problems.

The most serious of these constitutional disputes over the reach of the President's power concerned war powers in the wake of the conflict in Vietnam. In 1964, Congress enacted the Tonkin Gulf Resolution authorizing action in Vietnam subject to termination by concurrent resolution.[46] After the Tonkin Gulf Resolution was repealed in

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[45] National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, Section 302, 72 Stat. 426, 433 (space program); Atomic Energy Act Amendment of 1958, Pub. L. No. 85-479, Section 4, 72 Stat. 276, 277 (cooperative nuclear agreements); Trade Expansion Act of 1962, Pub. L. No. 87-794, Section 351, 76 Stat. 872, 899, 17 U.S.C. 1981 (tariff recommended by Tariff Commission may be imposed by concurrent resolution of approval); Postal Revenue and Federal Salary Act of 1967, Pub. L. No. 90-206, Section 255(i)(1), 81 Stat. 613, 644.

[46] The resolution provided that its authority "shall expire when the President shall determine that the peace and security of the area is reasonably assured . . . except that it may be terminated earlier by concurrent resolution of the Congress." Section 3 of H.R.J. Res. 1145, 88th Cong., 2d Sess., Pub. L. No. 88-408, 78 Stat. 384, 385 (1964).

1970, the President claimed inherent authority to continue hostilities, and subsequently he extended military operations to Cambodia and Laos.[47]

Responding to these developments, in the early 1970's Congress deliberated extensively on legislation to govern the exercise of war powers. Congress considered carefully the constitutional issues involved in such legislation.[48] A provision of the key House bill authorized termination by concurrent resolution of use of armed forces in hostilities; its constitutionality was challenged as violating the Presentation Clause and defended as following the precedents of the Reorganization Act and the Tonkin Gulf Resolution.[49]

Subsequently, the constitutional issues were debated on the House floor, and were addressed in memoranda submitted by the House and Senate conferees on their respective chambers' bills.[50] The Constitution provides that "The Congress shall have Power . . . to declare War," Art. I, Sec. 8, cl. 11; it also provides that "The President shall be Commander in Chief of the Army and Navy of the United States. . . ." Art. II, Sec. 2, cl. 1. During the consideration of war powers legislation, Administration spokesmen had emphasized the necessity for Presidents to be able to react immediately to international emergencies by use of armed forces without awaiting a declara-

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[47] See House Comm. on Foreign Affairs, 97th Cong., 1st Sess., *The War Powers Resolution* 26–30, 70–71, 106–10 (Comm. Print 1982) *("War Powers Resolution")* (describing Presidential justifications for, and Congressional reactions to, 1970 Cambodia and 1971 Laos incursions, and 1973 Cambodia bombing).

[48] For descriptions of the House and Senate hearings on war powers, see *War Powers Resolution, supra* note 47, at 55–61 (1970 House hearings), 72–77 (1971 Senate hearings), 93–95 (1971 House hearings), 119–21 (1973 House hearings), and 133–34 (1973 Senate hearings). For description of the legislative debate on war powers legislation *see id.* at 43–166.

[49] *War Powers Resolution, supra* note 47, at 123.

[50] *War Powers Resolution, supra* note 47, at 144–45. The House conferees' memorandum had been published during the House debates on passage of the House bill. See 119 Cong. Rec. 21223–25 (1973).

tion of war; they cited the history of Presidential commitments of armed forces without express legislative authority.[51] Supporters of war powers legislation sought means to implement the constitutional responsibility for the Congress to "declare War" before the nation committed itself to prolonged combat, while not precluding emergency Presidential commitments of armed forces in appropriate circumstances. They focused on two mechanisms for insuring legislative decisions after an emergency commitment: an automatic end to such a commitment after a fixed period of time absent express legislative authorization to continue, and a provision for termination by concurrent resolution.[52]

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[51] *War Powers Resolution, supra* note 47, at 58, 74, 84-85, 113, 119-20; *see also id.* at 29-30, 38 (Administration positions on war powers stated prior to Congressional consideration of war powers legislation).

[52] The House bill, H.R.J. Res. 542, 93d Cong., 1st Sess., relied on a limit of 120 days after which continued commitment of armed forces would require Congressional approval. It also provided for termination of commitment of armed forces at any time by concurrent resolution. The Senate bill, S. 440, 93d Cong., 1st Sess., imposed a limit of thirty days for commitment of armed forces without Congressional approval, but permitted the President unspecified additional time to remove such forces safely from hostilities. It did not provide for termination by concurrent resolution, but specified in some detail the circumstances when the President could commit armed forces. *War Powers Resolution, supra* note 47, at 142.

As a compromise, the War Powers Resolution provided a statement of the "constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances," section 2(c), 50 U.S.C. 1541(c). However, subsequent sections of the resolution, in which provisions for limiting and terminating commitment of armed forces were set forth, were not made dependent on the authority for the initial commitment. H.R. Rep. No. 547, 93d Cong., 1st Sess. 1-2 (1973). Automatic termination of hostilities in the absence of congressional authorization was to occur after sixty days, with an additional thirty days if the President found "unavoidable military necessity respecting the safety" of the armed forces. Section 5(b), 50 U.S.C. 1544(b). The compromise was completed by a provision for termination by concurrent resolution. Section 5(c), 50 U.S.C. 1544(c).

Regarding such termination, the House conferees' memorandum relied on an opinion submitted by Professor Freund, whose "conclusion [was] that, on the substantive premises of the bill, the provision respecting a concurrent resolution is a valid and appropriate measure, and does not raise constitutional issues of the kind mooted in connection with other categories of legislation." [53] The House provision thus justified was enacted by Congress as section 5(c) of the War Powers Resolution, 50 U.S.C. 1544(c), which provides:

> Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

After the House and Senate adopted the conference version of the War Powers Resolution, President Nixon vetoed it. The President's veto message contended that two provisions were unconstitutional: the provision that "would automatically cut off certain authorities [to commit armed forces to hostilities] after sixty days," and the provision that "would allow the Congress to eliminate certain authorities merely by the passage of a concurrent resolution—an action which does not normally have the force of law, since it denies the President his constitutional role in approving legislation." [54] President Nixon's veto message was the first time since adoption of the Reorganization Act of 1939 that any President had formally disputed the constitutionality of a legislative review provision other than a provision for committee review. The House and Senate passed the War Powers Resolution over the President's veto, the only time a legislative

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[53] 119 Cong. Rec. 21224-25 (1973) (reprinting letter of June 12, 1973, from Paul A. Freund to Rep. Pierre S. du Pont).

[54] 9 Weekly Comp. Pres. Doc. 1285-87 (1973).

review provision has ever been enacted over a Presidential challenge to its constitutionality.[55]

The following year, Congress resolved the problem posed by Presidential claims of inherent power to impound appropriations by a similar measure. In the early 1970's, President Nixon impounded appropriated funds totalling over eighteen billion dollars.[56] In response, Congress held hearings on legislation to govern impoundment,[57] and enacted such legislation as part of a general reform of the Congressional budget process. In 1973 and 1974, the Senate passed two bills, the first providing that impoundments could become effective only if both Houses approved, the second forbidding all impoundments.[58] The House adopted a provision allowing impoundments so long as either House could disapprove them.[59] Critics challenged the constitutionality of the House provision, while its supporters defended it as following the Reorganization Act.[60]

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[55] President Carter later took a different view of the War Powers Resolution, endorsing it as a "constructive safeguar[d]." *President's Message to the Congress on Legislative Vetoes,* Pub. Papers 1146, 1149 (1978).

[56] *See* 119 Cong. Rec. 8295-96 (1973).

[57] *Joint Hearings on Impoundment of Appropriated Funds by the President Before the Ad Hoc Subcomm. on Impoundment of Funds of the Senate Comm. on Government Operations and the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973); *Hearings on Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971).

[58] S. 373, 93d Cong., 1st Sess., adopted by the Senate, 119 Cong. Rec. 15255 (1973), allowed the President to impound appropriations for sixty days, at which point the impoundment would cease unless Congress adopted a concurrent resolution of approval. The Senate adopted H.R. 7130, 93d Cong., 2d Sess., after substituting, in place of the House language, the language of S. 1541, 93d Cong., 2d Sess., which prohibited impoundments. 120 Cong. Rec. 7938 (1974).

[59] H.R. 7130, 93d Cong., 1st Sess., adopted by the House, 119 Cong. Rec. 39740 (1973).

[60] *Compare* H.R. Rep. No. 658, 93d Cong., 1st Sess. 42 (1973) (finding "sufficient precedent" in the Reorganization Act) with *id.* at 87 (mi-

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In conference, a compromise was achieved under which permanent impoundments, termed "rescissions," would require approval through enactment of legislation. In contrast, temporary impoundments, or "deferrals," would become effective unless disapproved by one House. This compromise provided the President with flexibility, while preserving the constitutional balance. The decision to permanently rescind funds was not delegated to the President, as that would allow him to undo previously enacted decisions on appropriations, a power of "suspension" of legislation denied him by the Framers.[61] Allowing the President to defer expenditures, subject to legislative review, preserved and aided the legislative process, since it provided time for a legislative decision on whether to change previous decisions on appropriations. These provisions were enacted with the President's approval.

The Impoundment Control Act's provision for legislative review has been used extensively. Presidents have submitted hundreds of proposed budget deferrals, of which sixty-five have been disapproved by resolutions of the House or Senate with no protest by the Executive. See Appendix B (tabulating disapprovals of budget deferrals). Even critics of legislative review recognize the

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nority views) (deeming a one-House disapproval resolution to "be of doubtful legal effect"). As the floor manager of the House bill, Representative Bolling, explained, "The formula [of Presidential proposal of impoundments subject to disapproval by either House] has been used for a quarter of a century to enable the President to propose, and Congress to review, plans to reorganize Federal agencies." 119 Cong. Rec. 25546 (1973).

[61] A proposal in the Constitutional Convention "that the national executive have a power to suspend any legislative act for the term of———" was rejected, after Elbridge Gerry observed "that the power of suspending might do all the mischief dreaded from the negative of useful laws, without answering the salutary purpose of checking unjust or unwise ones." 5 J. Elliott, *supra* note 9, at 154–55. *See Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 885–94 (1981) (discussing case law and historical underpinnings for lack of Presidential authority to suspend legislation).

soundness of the act's solution to the impoundment problem: President Carter, in his message on legislative vetoes, termed the budget act, like the War Powers Resolution, a "constructive safeguar[d]," and the House Rules Committee, which has opposed other kinds of legislative review provisions, deemed the War Powers Resolution and the impoundment control provisions "compelling examples [of] histories of essentiality." [62]

These statutes were followed by others resolving similar problems: the National Emergencies Act, resolving the longstanding problems with unchecked Executive emergency power; [63] the Arms Export Control Act, resolving the problem of foreign arms sales; [64] and the Nuclear Non-Proliferation Act of 1978, resolving the problem of exports of nuclear capability. [65] Under these provisions, major congressional deliberations over foreign policy have

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[62] *President's Message to the Congress on Legislative Vetoes,* Pub. Papers 1146, 1149 (1978); H.R. Rep. No. 809, 97th Cong., 1st Sess., pt. 2, at 18 (1982).

[63] Pub. L. No. 94-412, 90 Stat. 1255 (1976). Section 202, 50 U.S.C. 1622, provides for termination of national emergencies by concurrent resolution. *See* Note, *The National Emergency Dilemma: Balancing the Executive's Crisis Powers with the Need for Accountability,* 52 S. Cal. L. Rev. 1453 (1979); A. Schlesinger, *The Imperial Presidency* 306-10 (1974); note 67 *infra* (Senate hearings and reports).

International emergencies can also be terminated by concurrent resolution. Act of December 8, 1977, Pub. L. No. 95-223, Section 207(b), 91 Stat. 1625, 1628, 50 U.S.C. 1706(b) (Supp. IV 1980) (concurrent resolution under National Emergencies Act can specify termination of Presidential authority in international emergencies). This Court has recently examined the background of an international emergency in which the President used the authority delegated by this statute. *Dames & Moore, Inc.* v. *Regan,* 453 U.S. 654 (1981).

[64] Pub. L. No. 94-329, 90 Stat. 729 (1976). Section 211, 22 U.S.C. 2776(b), provides for disapprovals of sales of major defense equipment by concurrent resolution. *See* Morrison, *The Arms Export Control Act: An Evaluation of the Role of Congress in Policing Arms Sales,* 14 Stan. J. Int'l Studies 105 (1979).

[65] Pub. L. No. 95-242, Sections 303, 304(a), 306, 307, and 401, 92 Stat. 120, 130, 134, 137, 139, 144-45, 42 U.S.C. 2160(f), 2155(b), 2157(b), 2158, and 2153(d) (Supp. IV 1980), provide for disapproval of various international nuclear arrangements by concurrent resolution.

occurred, such as in consideration of President Reagan's 1981 plans to sell sophisticated aircraft to Saudi Arabia.[66]

D. ENERGY

Legislative review has served a crucial function in balancing broad delegations in legislation responding to the energy crisis of the 1970's, as shown in one of the other challenges to legislative review which is now before this Court, *United States Senate* v. *Consumer Energy Council of America, supra* note 1. The origin of this role of legislative review is explained in the legislative history of the proposed Energy Emergency Act of 1973, the progenitor of much of the energy legislation of the past nine years. In late 1973, as a result of the embargo by Arab states on shipment of oil to the United States, "the need to take emergency actions to deal with the situation [was] clearly established." H.R. Rep. No. 710, 93d Cong., 1st Sess. 24 (1973). Within a month after the embargo began, the President sought broad emergency powers from Congress to restrict public and private energy consumption, grant exemptions from environmental laws to allow more coal use, order conversion of powerplants to coal use, initiate production from naval oil reserves, and license temporarily nuclear plants without a public hearing. *Id.* at 24-25.

Congress recognized that the energy crisis raised again a problem that had recurred since "the first declared national emergency in 1933. . . . [¶] Over the course of that forty-year period, the Congress has repeatedly been presented with the problem of finding a means by which a legislative body in [a] democratic republic may extend extraordinary powers for use by the Executive during times of great crisis without imperiling our constitutional balance of liberty and authority." *Id.* at 25. Based on an investigation of the use of emergency authority since

[66] *See* H.R. Rep. No. 268, 97th Cong., 1st Sess. (1981); S. Rep. No. 249, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. H7236-7308 (daily ed. Oct. 14, 1981); *id.* at S12237-12452 (daily ed. Oct. 28, 1981).

1933,[67] Congress was reluctant to delegate unchecked emergency authority over energy use. Moreover, such a delegation would have raised the central concerns of the nondelegation doctrine, since "[t]he unrestrained power to determine the burden of shortages is the power to make a political decision of the highest order." *Arizona* v. *California, supra* page 9, 373 U.S. at 626 (Harlan, J., dissenting in part).

Instead, first the Senate, and then both Houses, turned to legislative review as the solution. The Senate Committee on Interior and Insular Affairs explained the need for legislative review:

> Because of the broad scope of the additional authority granted the executive branch under this act, the committee believes that it is necessary for the Congress to review the manner in which that authority is to be exercised.

S. Rep. No. 498, 93d Cong., 1st Sess. 27 (1973). The conference committee adopted this approach, concluding "that the disapproval mechanism contained in this legislation provides the best opportunity for resolution of this problem." H.R. Rep. No. 763, 93d Cong., 2d Sess. 42 (1974) (conference report on the Energy Emergency Act). Both Houses enacted the conference version of the bill, delegating the Executive authority for mandatory energy conservation, rationing, and conversion of gas- and oil-burning facilities to coal use, subject to legislative review of Executive plans. The President did not object to the provi-

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[67] *See Emergency Powers Statutes: Provisions of Federal Law Now in Effect Delegating to the Executive Extraordinary Authority in Time of National Emergency,* S. Rep. No. 549, 93d Cong., 1st Sess. (1973) (Report by the Senate Special Committee on the Termination of the National Emergency); *National Emergency: Constitutional Questions Concerning Emergency Powers, Hearings Before the Senate Special Comm. on the Termination of the National Emergency,* 93d Cong., 1st Sess. (1973). In rejecting an unchecked grant of emergency power, the House Committee on Interstate and Foreign Commerce relied on the Special Committee's report. *See* H.R. Rep. No. 710, 93d Cong., 1st Sess. 25 (1973).

sions for legislative review. Indeed, in December, 1973, less than two months after President Nixon vetoed the War Powers Resolution, the Administration apparently supported a proposal for delegation of broad energy powers subject to legislative review.[68] When emergency legislation emerged from conference, President Nixon vetoed it in March, 1974, based on criticism of its substantive authority, without opposing legislative review provisions.[69]

Subsequently, most of the authority proposed in the bill was enacted or reenacted in other energy legislation with legislative review provisions. Legislative review became the critical component for balancing a host of broad statutory delegations concerning energy rationing, contingency plans strategic oil reserves, allocation of energy production materials, oil exports, and naval reserve production.[70] While President Carter opposed some legislative review provisions, he accepted others. For example, the House of Representatives passed legislation to authorize

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[68] President Nixon "sought authority to institute emergency plans immediately, subject only to a congressional veto within 15 days. . . ." *Excess Profits Provision Delays Emergency Energy Bill,* 31 Cong. Q. Weekly Rev. 3335 (1973). The Senate Committee on Interior and Insular Affairs reported out such authority, S. 2589, 93d Cong., 1st Sess. (as reported), based on extensive consultations in closed hearings with administrative representatives. S. Rep. No. 498, 93d Cong., 1st Sess. 15 (1973).

[69] S. Doc. No. 61, 93d Cong., 2d Sess. (1974) (veto message), *reprinted in* 120 Cong. Rec. 5491 (1974).

[70] Naval Petroleum Reserves Production Act of 1976, Pub. L. No. 94-258, Section 201, 90 Stat. 303, 309, 10 U.S.C. 7422(c)(2)(C) (naval reserve production); Energy Policy and Conservation Act, Pub. L. No. 94-163, Sections 159, 201, 401(a), and 455, 89 Stat. 871, 886, 890, 941, and 950 (1975), 42 U.S.C. 6239 and 6261, 15 U.S.C. 757 and 760a (strategic oil reserves, rationing and contingency plans, oil price controls and product allocation); Federal Nonnuclear Energy Research and Development Act of 1974, Pub. L. No. 93-577, Section 12, 88 Stat. 1878, 1892-93, 42 U.S.C. 5911 (allocation of energy production materials); Act of November 16, 1973, Pub. L. No. 93-153, Section 10, 87 Stat. 576, 582, 30 U.S.C. 185(u) (oil exports).

adoption of standby gasoline rationing plans subject to legislative review, with President Carter's approval:[71]

> I don't object to the one House veto if it's done expeditiously. . . . [¶] I have no objection to [a provision for] the House, within 2 weeks [after submission of a rationing plan], either approving the plan that I have tried to put into being or if either House wants to veto it, they can do that.

One of the energy acts, the Natural Gas Policy Act of 1978 ("NGPA"), is challenged in a legislative review case recently docketed in this Court. See note 72 *infra*. Congress enacted the NGPA after eighteen months of strenuous effort to solve the enormously divisive and controversial issues raised by President Carter's energy proposals. As part of gradual natural gas price deregulation, Title II of the NGPA establishes a program for "incremental pricing" of natural gas, under which some industrial users of natural gas pay a disproportionate share of price increases for tapping new sources of gas.

Congress was willing to mandate in 1978 that such incremental price increases be paid by low-priority "boiler fuel" users of natural gas. However, it was reluctant to extend such pricing to high-priority industrial gas users, with their important role in the national economy. As a court of appeals has noted, "[t]he incremental pricing scheme Congress adopted in the NGPA was novel and experimental, and viewed with some trepidation by many members who feared it would bring in its wake massive switching to non-gas fuels, regional dislocations of industry, and a bureaucratic orgy." *Ohio Association of Community Action Agencies* v. *Federal Energy Regulatory Commission*, 654 F.2d 811, 820 (D.C. Cir.1981).

Accordingly, Congress established a procedure for gaining experience with incremental pricing before it was fully implemented. It balanced the delegation of authori-

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[71] *President's News Conference of July 25, 1979*, 15 Weekly Comp. Pres. Doc. 1303, 1311 (1979). The statute referred to was enacted as the Emergency Energy Conservation Act of 1979, Pub. L. No. 96-102, Section 103, 93 Stat. 749, 753, 42 U.S.C. 6421(c) (Supp. IV 1980).

ty to devise incremental pricing regulations for high-priority industrial users with a provision for legislative review, in light of the regulations' potential for drastically affecting the burden of natural gas pricing.[72] Pursuant to that provision for legislative review, in 1980 the House of Representatives disapproved incremental pricing regulations. Consumer groups challenged the legislative review provision, and a panel of the court of appeals declared the statute unconstitutional, both on separation of powers grounds and on a sweeping view of the Presentation Clause. *Consumer Energy Council of America* v. *FERC, supra* note 1.

E. RULEMAKING

In recent years, Congress has experimented with use of legislative review as a check on broad delegations of rulemaking authority, as shown by the second recent challenge to legislative review which has been appealed to this Court, *Consumers Union of U.S., Inc.* v. *Federal Trade Commission, supra* note 1. Since the power to make rules is, in effect, a delegation of the power to legislate, broad delegations to agencies of such power raise the fundamental concerns underlying the nondelegation doctrine. As delegations of rulemaking authority to independent regulatory commissions, and to Executive Branch agencies, have become broader, they have been criticized for "threaten[ing] the legitimacy of agency action," [73] leading to "a strong and persisting challenge

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[72] Natural Gas Policy Act of 1978, Pub. L. No. 95-621, Section 202(c), 92 Stat. 3350, 3372, 15 U.S.C. 3342(c) (Supp. IV 1980). The statutory scheme is further described in *Petition of United States Senate for a Writ of Certiorari, United States Senate v. Consumer Energy Council of America, et al., petition for certiorari filed,* 51 U.S.L.W. 3099 (U.S. August 2, 1982) (No. 82-177). *See also* note 1 *supra.*

[73] Stewart, *The Reformation of American Administrative Law,* 88 Harv. L. Rev. 1669, 1676 (1975). For other discussions of the contemporary delegation problem, *see* Cutler & Johnson, *Regulation and the Political Process,* 84 Yale L.J. 1395 (1975); McGowan, *Congress, Court, and Control of Delegated Power,* 77 Colum. L. Rev. 1119 (1977); Wright, *Beyond Discretionary Justice,* 81 Yale L.J. 575 (1972).

to the basic legitimacy of the administrative process itself." [74]

This Court has expressed serious concern with broad rulemaking delegations. *See Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, supra* note 14. However, there are circumstances when it is impractical or undesirable for Congress to enact narrowly drafted solutions which anticipate all aspects of a national problem.[75] Rulemaking by independent regulatory commissions presents Congress with a special aspect of this problem, because the independent regulatory commissions are not democratically accountable through Presidential responsibility.[76]

In 1975, Congress expressly delegated to the Federal Trade Commission (FTC) broad authority to make rules to prevent businesses from engaging in "unfair or deceptive acts or practices in commerce." [77] After several years' ex-

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[74] J.O. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 10 (1978).

[75] Narrowly specific delegations

> would be neither feasible nor desirable in many cases. . . . [¶] In many government endeavors it may be impossible in the nature of the subject matter to specify with particularity the course to be followed. . . . [¶] In addition, there appear to be serious institutional constraints on Congress' ability to specify regulatory policy in meaningful detail.

Stewart, *supra* note 73, 88 Harv. L. Rev. at 1695 (footnotes omitted).

[76] The President does not control independent agency rulemaking because independent agencies are not part of the Executive Branch and their commissioners are not subject to executive removal. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Accordingly, Executive review of rulemaking has exempted independent agency rulemaking from control. Section 1(d) of Executive Order 12291, 46 Fed. Reg. 13193 (1981) (rulemaking review by the Office of Management and Budget excludes independent agencies), *citing* 44 U.S.C. 3052(10).

[77] In 1973, a court of appeals ruled that the FTC's authority under its 1914 charter allowed it to make substantive rules. *National Petroleum Refiners Assn.* v. *FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). In 1975, Congress expressly delegated such authority in the Federal Trade Commission Improvement Act. Pub. L. No.

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perience with FTC rulemaking, Members of Congress found that under the FTC's

> very broad authorities to prohibit conduct which is 'unfair or deceptive' the FTC can regulate virtually every aspect of America's commercial life. . . . The FTC's rules are not merely narrow interpretations of a tightly drawn statute; instead, they are broad policy pronouncements which Congress has an obligation to study and review.

124 Cong. Rec. 5012 (1978) (statement by Representative Broyhill). Legislative review was proposed to constrain that broad delegation.

Congress gave extensive consideration to the constitutionality of legislative review for FTC rulemaking, examining, most importantly, the Attorney General's 1977 opinion reaffirming the constitutionality of the legislative review provision in the Reorganization Act.[78] After three years of hearings and debate, in 1980 Congress enacted a legislative review provision in its reauthorization of the FTC.[79] In 1982 Congress adopted a concurrent resolution disapproving FTC rules concerning the used car industry. The constitutionality of the legislative review provision was challenged and in October, 1982, the court of appeals

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93-367, Section 202(a), 88 Stat. 2183, 2193 (1975), 15 U.S.C. 57a (Supp. IV 1980) (as amended).

[78] The Attorney General concluded that "[T]he statement in Article I, § 7, of the procedural steps to be followed in the enactment of legislation does not exclude other forms of action by Congress. . . . [¶] The procedures prescribed in Article I, § 7, for congressional action are not exclusive." 43 Op. Att'y Gen., Op. No. 10, at 2-3 (1977). The Deputy Assistant Attorney General for the Office of Legal Counsel was questioned about the Attorney General's opinion during hearings on the FTC provision, and agreed that the opinion "was antedated by statements made by the heads of my office, starting at least as far back as now Justice Rehnquist, and I think going back a number of years beyond that to then Attorney General Clark in 1949." *Oversight of the Federal Trade Commission: Hearings Before the Subcomm. for Consumers of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 236 (1979).

[79] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, Section 21(a), 94 Stat. 374, 393, 15 U.S.C. 57a-1 (Supp. IV 1980).

declared it unconstitutional in a brief per curiam opinion, based on the court's previous invalidation of the natural gas incremental pricing provision. *Consumers Union of U.S., Inc.* v. *FTC, supra* note 1.

Legislative review for independent agency rulemaking has been before this court once before. In 1976, the legislative review provision for rulemaking by an independent commission, the Federal Election Commission, was challenged. *Buckley* v. *Valeo,* 424 U.S. 1 (1976). While the majority opinion did not reach that constitutional challenge, *id.,* 424 U.S. at 140 n.176, Justice White's concurring opinion concluded that legislative review was constitutional, because Congress was not making rules, but only disapproving them.[80] "[I]n the light of history and modern reality, the provision for congressional disapproval of agency regulations does not appear to transgress the constitutional design, at least where the President has agreed to legislation establishing the disapproval procedure. . . ." *Id.* at 285–86 (White, J., concurring in part and dissenting in part). Since then, this Court has reviewed Federal Election Commission rules which had been previously reviewed by Congress, and has found the prior legislative review to be an aid in construing the statute. *Federal Election Commission* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 34 (1981).

Besides applying legislative review to rulemaking by independent agencies, Congress has also experimented with legislative review for certain executive agencies. The constitutional dispute over such provisions began with one for education regulations. During the 1960's, Congress enacted a number of narrow grant programs to be administered by the Commissioner of Education. In 1969, President Nixon sought discretion to consolidate fragmented

[80] "Disapproval nullifies the suggested regulation and prevents the occurrence of any change in the law. The regulation is void. . . . It would be considerably different if Congress itself purported to adopt and propound regulations by the action of both Houses." 424 U.S. at 285 n.30 and 286 (White, J., concurring in part and dissenting in part).

grant programs, while checking the discretion thereby delegated through legislative review:

> The legislation I propose would be patterned in part after procedures used successfully for the past 20 years to reorganize Executive Branch functions. It would give the President power to initiate consolidation of closely related Federal assistance programs, and to place consolidated programs under the jurisdiction of a single agency. However, it would give either House of Congress the right to veto a proposed consolidation within 60 days, and it would establish stringent safeguards against possible abuse.[81]

Congress found subsequently that fragmented and narrow education grant programs "inevitably lead to Executive-Legislative confrontations" because they inappropriately limit the Commissioner of Education's authority: "a Commissioner unwilling to tolerate the delay inherent in proposing new legislation is tempted to 'bend' existing program requirements and to combine different program authorities to secure the base of funding necessary to implement his ideas." S. Rep. No. 763, 93d Cong., 2d Sess. 69 (1974). To solve this problem, in 1974 Congress "elim'nate[d] the [grant] categories that now limit[ed] the Commission[er]'s discretion. In their place it substitute[d] a broad authority with minimal strings attached." *Id.*

However, as President Nixon's suggestion of legislative review had reflected, ending the narrow grant categories conferred great discretion. Congress recognized that prior discretion had led to "steady escalation of agency quasi-legislative power, and the corresponding attrition in the ability of the Congress to make the law. For at least four decades now, the agencies of the Executive Branch have increasingly used their rule-making authority to 'correct' what they feel are the errors and ambiguities of the law." H.R. Rep. No. 805, 93d Cong., 2d Sess. 73 (1974). Accord-

[81] *President's Message to the Congress Proposing Legislation for Improving Administration of Grant-in-Aid Programs*, 5 Weekly Comp. Pres. Doc. 635 (1969).

ingly, the statute which consolidated the grants subjected rulemaking by the Commissioner of Education to legislative review.[82]

President Ford signed the bill into law on August 21, 1974, "[a]s the first major legislation to become law during my Administration. . . ." [83] He praised Congress for consolidating narrow categorical grant programs, *id.*, but protested that the review provision constituted an attempt by Congress "to administer Federal programs" which was "questionable on practical as well as constitutional grounds." *Id.* at 37. Together with President Nixon's veto of the War Powers Resolution, President Ford's protest inaugurated the period of the last nine years during which the Executive Branch has formally disputed most, but not all provisions for legislative review.

Recent Congresses have considered proposals to make legislative review provisions applicable to rulemaking by all federal agencies.[84] In the 95th and 96th Congresses, regulatory reform bills received extensive consideration, but neither House voted on such bills.[85] In the current

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[82] Title IV of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484, 535, consolidated a series of grant programs. Section 509 of the act, now codified at 20 U.S.C. 1232(d)(1) provided that rules for the general education program could be disapproved by concurrent resolution. As in the case of Federal Election Commission regulations, see page 35 *supra*, this Court has reviewed education regulations which have been previously reviewed by Congress under this provision, and has found the prior legislative review to be an aid in construing the statute. *See North Haven Bd. of Education* v. *Bell*, 102 S.Ct. 1912, 1923-24 (1982).

[83] Pub. Papers 35, 37 (1974).

[84] H.R. 12048, 94th Cong., 2d Sess., was voted on under a motion for suspension of the rules, which requires a two-thirds vote to pass. It was rejected on a vote of 265-135, two votes short of the necessary two-thirds. *See* H.R. Rep. No. 1014, 94th Cong., 2d Sess. (1976); 122 Cong. Rec. 31668 (1976).

[85] *See* S. Rep. No. 1018, 96th Cong., 2d Sess., pt. 2, at 12-17 (1980). In the House, hearings were held in the 96th Congress on generic legislative review legislation, but no bill was reported. *See* 125 Cong. Rec.

Continued

97th Congress, a generic legislative review bill passed the Senate,[86] but it has not been voted on in the House. During this period, Congress has given extensive consideration to the constitutional arguments regarding such review.[87] At this time, it has reached no resolution of the legislative issues regarding such review, and its consideration is still evolving.

CONCLUSION

The evolution of legislative review indicates three principal reasons why this Court should not accept the respondents' sweeping challenge to all legislative review provisions based on the Presentation Clause. First, legislative review has not served as a means for Congress to enact legislation, the Framers' concern underlying the Presentation Clause. Rather, Congress has enacted legislative review provisions in response to the claims of Presidents, or requests by them, for broad powers. Legislative review has not expanded Congress's power; it has been the means for giving Presidents the broad authority

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E5023 (daily ed. Oct. 12, 1979) (statement of Attorney General Civiletti at hearings on legislative review bills before the Subcommittee on Rules of the House).

[86] 128 Cong. Rec. S2713 (daily ed. March 24, 1982).

[87] *Compare, e.g.,* 128 Cong. Rec. S2572-84 (daily ed. March 23, 1982) (statement by Sen. Schmitt) (defending the constitutionality of legislative review) *with* Subcommittee on Rules of the House, 97th Cong., 1st Sess., *Background Information on Regulatory Reform and Congressional Review of Agency Rules* 11-15 (Subcomm. Print 1981) (criticizing legislative review). The constitutional debate has included consideration of parallel provisions and historic bases. *See, e.g.,* 128 Cong. Rec. S2598 (daily ed. March 23, 1982) (statement of Sen. Levin defending legislative review):

> We should not willingly surrender our right to act on arms sales, we should not willingly surrender our right to act on the sale of nuclear fuel, we should not willingly surrender our right to act under the War Powers Act relative to the introduction of American troops into foreign lands, [and] we should not willingly surrender our right to review the President's decisions on reorganization of the Department of Energy or the Department of Education. . . .

they have sought to reorganize the government after the Depression, to wage World War II, and to deal with the budget, national security, and energy problems of the 1970's, while maintaining the constitutional balance.

Second, the evolution of legislative review shows the varied positions the Presidents have taken and the extensive consideration Congress has given to constitutional issues. It is the role of this Court ultimately to " 'say what the law is.' " *United States* v. *Nixon*, 418 U.S. 683, 703 (1974), *quoting Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Yet the historic relations of the elective branches, growing out of their response to the modern problems of governance, sheds light on constitutional issues. From the adoption of the Reorganization Act in 1939 until the veto of the War Powers Resolution in 1973, no President formally disputed the constitutionality of legislative review other than committee review. Rather, the administrations of Presidents Truman, Kennedy, Johnson, and Nixon not only approved legislative review, but urged Congress to adopt legislative review provisions. In 1941, 1949, 1961, and 1977, Administration legal memoranda explored and justified such provisions' constitutionality. In so doing, the executive branch showed a sound judgment about the actual functioning of such review, not as a device to impair the system of checks and balances, but as a means for making that system work in the face of modern problems.

Finally, a sweeping approach to legislative review cannot responsibly deal with its varied uses and contexts. Even the court of appeals in this case, in declaring section 244 of the INA unconstitutional, restricted its ruling to matters relating to the particular provision, and did not accept the sweeping Presentation Clause argument. It agreed that "the practicality of alternatives to legislative disapproval in other situations raises difficult questions . . . . Such factors might present considerations different from those we find here. . . ." (J.S. 55a.) (footnotes omitted). A sweeping approach would deny to the Court an

understanding of the actual roles of legislative review provisions, with their varying histories, constitutional contexts, and justifications. In cases currently pending, this Court will have the opportunity to examine legislative review in two of its uses: in energy legislation, and in independent agency rulemaking. By focusing on separation of powers, this Court can approach each of these cases on its own merits without prematurely foreclosing its conclusions.

The Court should not accept respondents' sweeping challenge to all legislative review provisions based on the Presentation Clause. Rather, it should focus on the issue of separation of powers and judge the constitutionality of particular legislative review provisions in their particular contexts. We reiterate our conviction that even this limited constitutional inquiry is unnecessary ir the circumstances of this case, *see* Sen. Reply Br. 18, and that the judgment of the court of appeals should be vacated or reversed for the reasons stated in Parts II, III, and IV of our opening brief.

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November 1982.

APPENDIX A

CONGRESSIONAL DISAPPROVALS UNDER THE REORGANIZATION ACTS

As discussed in the brief on pages 11-14, Congress first delegated reorganization authority, subject to legislative review, in 1932. Congress revived such authority in 1939, and thereafter renewed it numerous times. Under the 1932 act, reorganizations were by executive orders subject to Congressional disapproval. From 1939 on, reorganizations were by plans subject to Congressional disapproval. Under the 1939 act, the reorganization authority provided for disapproval by concurrent resolution of both Houses. The 1932 act, and all acts from 1949 on, provided for disapproval by simple resolution of either House.

Presidents have submitted 115 reorganization plans to Congress of which 23 have been disapproved pursuant to legislative review provisions. These disapprovals show the history of use of the legislative review provision without disruption in the separation of powers.

APPENDIX A: CONGRESSIONAL DISAPPROVALS OF REORGANIZATION PLANS

Reorganization Plan	Main Subject	Disapproval Resolution	Congress	Citation
11 Executive Orders	Various	H. Res. 334	72d	78 Cong. Rec. 2126 (1933).
No. 1 of 1946	National Housing Agency	H. Con. Res. 155	79th	92 Cong. Rec. 7911 (1946); 92 Cong. Rec. 8994 (1946).
No. 2 of 1947	Transfer of Administration of Unemployment Service to Department of Labor.	H. Con. Res. 49	80th	93 Cong. Rec. 6740 (1947); 93 Cong. Rec. 7874 (1947).
No. 1 of 1948	Transfer of Employment Service and Bureau of Employment Security to the Department of Labor.	H. Con. Res. 131	80th	94 Cong. Rec. 1721 (1948); 94 Cong. Rec. 2921 (1948).
No. 1 of 1949	Department of Welfare	S. Res. 147	81st	95 Cong. Rec. 11560 (1949).
No. 1 of [illegible]	Office of the Comptroller of the Currency.	S. Res. 246	81st	96 Cong. Rec. 6898 (1950).
No. 4 of 1950	Department of Agriculture	S. Res. 263	81st	96 Cong. Rec. 7235 (1950).
No. 7 of 1950	Interstate Commerce Commission	S. Res. 253	81st	96 Cong. Rec. 7173 (1950).
No. 11 of 1950	Federal Communications Commission	S. Res. 256	81st	96 Cong. Rec. 7177 (1950).
No. 12 of 1950	National Labor Relations Board	S. Res. 248	81st	96 Cong. Rec. 6886 (1950).
No. 24 of 1950	Transfer of Reconstruction Finance Corporation to the Department of Commerce.	S. Res. 290	81st	96 Cong. Rec. 9694 (1950).
No. 27 of 1950	Department of Health, Education and Security.	H. Res. 647	81st	96 Cong. Rec. 9864 (1950).
No. 2 of 1952	Post Office Department	S. Res. 317	82d	98 Cong. Rec. 7495 (1952).
No. 3 of 1952	Bureau of Customs	S. Res. 331	82d	98 Cong. Rec. 7513 (1952).
No. 4 of 1952	Department of Justice	S. Res. 330	82d	98 Cong. Rec. 7503 (1952).
No. 1 of 1956	Departments of the Army, Navy, and Air Force.	H. Res. 534	84th	102 Cong. Rec. 11886 (1956).
No. 2 of 1956	Home Loan Bank Board	H. Res. 541	84th	102 Cong. Rec. 11886 (1956).

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No. 1 of 1959	Transfer of Authorities to the Department of Agriculture.	H. Res. 295	86th	105 Cong. Rec. 12856 (1959).
No. 1 of 1961	Securities and Exchange Commission	S. Res. 148	87th	107 Cong. Rec. 11003 (1961).
No. 2 of 1961	Federal Communications Commission	H. Res. 303	87th	107 Cong. Rec. 10463 (1961).
No. 5 of 1961	National Labor Relations Board	H. Res. 328	87th	107 Cong. Rec. 13078 (1961).
No. 1 of 1962	Department of Urban Affairs and Housing.	H. Res. 530	87th	108 Cong. Rec. 2680 (1962).
No. 2 of 1967	Tariff Commission	S. Res. 114	90th	113 Cong. Rec. 12523 (1967).

APPENDIX B

DISAPPROVALS UNDER THE CONGRESSIONAL BUDGET AND IMPOUNDMENT CONTROL ACT

As discussed in the brief on pages 24–26, Congress first delegated budget deferral authority, subject to legislative review, in 1974. Presidents have submitted hundreds of budget deferrals to Congress pursuant to the 1974 act, of which sixty-five have been disapproved. No President has disputed the validity of any of these disapprovals. This history, like the history under the Reorganization Acts, shows extensive use of a legislative review provision without disruption in the separation of powers.

Appendices A and B are based upon data compiled by Clark Norton, Analyst in American National Government, Congressional Research Service, Library of Congress.

APPENDIX B: CONGRESSIONAL DISAPPROVALS OF BUDGET DEFERRALS

Deferral Number	Subject and Amount	Disapproval Resolution	Congress	Citation
D75-81	Corps of Engineers general construction, $43,945,000.	H. Res. 241	94th	121 Cong. Rec. 6345 (1975).
D75-82	Corps of Engineers flood control, $14,503,000	H. Res. 242	94th	121 Cong. Rec. 6346 (1975).
D75-83	Bureau of Reclamation loan program, $900,000	H. Res. 243	94th	121 Cong. Rec. 6346 (1975).
D75-84	Bureau of Reclamation construction and rehabilitation, $17,955,000.	H. Res. 244	94th	121 Cong. Rec. 6346 (1975).
D75-85	Bureau of Reclamation Colorado River basin project, $2,525,000.	H. Res. 245	94th	121 Cong. Rec. 6346 (1975).
D75-86	Bureau of Reclamation storage project, $1,730,000.	H. Res. 246	94th	121 Cong. Rec. 6346 (1975).
D76-74	Department of Agriculture, Resource Conservation and Development, $4,960,000.	H. Res. 916	94th	121 Cong. Rec. 41947 (1975).
D76-79	Environmental Protection Agency, air research and development, $2,000,000.	H. Res. 920	94th	121 Cong. Rec. 41950 (1975).
D76-80	Environmental Protection Agency, water quality research, $4,600,000.	H. Res. 921	94th	121 Cong. Rec. 41950 (1975).
D76-81	Environmental Protection Agency, air control agency grants, $3,750,000.	H. Res. 922	94th	121 Cong. Rec. 41950 (1975).
D76-82	Environmental Protection Agency, water quality control agency grants, $10,000,000.	H. Res. 923	94th	121 Cong. Rec. 41951 (1975).
D76-83	Environmental Protection Agency, Clean Lakes grants, $15,000,000.	H. Res. 924	94th	121 Cong. Rec. 41951 (1975).
D75-94	National Oceanic and Atmospheric Administration, $4,073,000.	H. Res. 309	94th	121 Cong. Rec. 8489 (1975).
D76-68	Agricultural Research Service	H. Res. 910	94th	121 Cong. Rec. 41946 (1975).
D76-69	Animal and Plant Health Inspection Service	H. Res. 911	94th	121 Cong. Rec. 41946 (1975).

D76-70	Agricultural Stabilization and Conservation Service, $90,000,000.	H. Res. 912	94th	121 Cong. Rec. 41947 (1975).
D76-72	Rural water and waste disposal grants, $50,000,000.	H. Res. 914	94th	121 Cong. Rec. 41947 (1975).
D76-73	Department of Agriculture watershed and flood prevention operations, $22,500,000.	H. Res. 915	94th	121 Cong. Rec. 41947 (1975).
D75-107	Department of Housing and Urban Development, comprehensive planning grants program, $50,000,000.	S. Res. 23	94th	121 Cong. Rec. 6432 (1975).
D75-48	Homeownership Assistance Program, $260,000,000.	S. Res. 61	94th	121 Cong. Rec. 6433 (1975).
D75-17	Federal Aid Highways, $10,700,000	S. Res. 69	94th	121 Cong. Rec. 11671 (1975).
D75-115	Research on nuclear powered artificial heart	S. Res. 32	94th	121 Cong. Rec. 13281 (1975).
D75-117	Atomic energy	S. Res. 75	94th	121 Cong. Rec. 13281 (1975).
D75-116	Atomic energy	S. Res. 76	94th	121 Cong. Rec. 13281 (1975).
D75-114	Atomic energy	S. Res. 77	94th	121 Cong. Rec. 13281 (1975).
D75-113	Atomic energy	S. Res. 78	94th	121 Cong. Rec. 13281 (1975).
D75-112	Atomic energy	S. Res. 79	94th	121 Cong. Rec. 13281 (1975).
D75-111	Atomic energy	S. Res. 80	94th	121 Cong. Rec. 13282 (1975).
Not given	Youth Conservation Corps, $10,000,000	S. Res. 205	94th	121 Cong. Rec. 22227 (1975).
D76-13 (D76-13a).	Columbia Basin irrigation project, Washington	S. Res. 226	94th	121 Cong. Rec. 38939 (1975).
D76-49	Emergency Energy Conservation Services, $16,500,000.	S. Res. 267	94th	121 Cong. Rec. 31655 (1975).
D76-68	Northeastern Appalachian Regional Fruit Crop Laboratory, $7,570,000.	S. Res. 313	94th	121 Cong. Rec. 38530 (1975).
D76-69	Fleming Key Animal Import Center	S. Res. 324	94th	121 Cong. Rec. 3966 (1975).
D76-101	Youth Conservation Corps	S. Res. 385	94th	122 Cong. Rec. 5680 (1976).
D76-103	Construction grants to public schools on Indian reservations.	S. Res. 388	94th	122 Cong. Rec. 5680 (1976).
D76-39 and D76-97.	Indian Health Facilities	S. Res. 366	94th	122 Cong. Rec. 5680 (1976).

APPENDIX B: CONGRESSIONAL DISAPPROVALS OF BUDGET DEFERRALS—Continued

Deferral Number	Subject and Amount	Disapproval Resolution	Congress	Citation
D76-96	Army Corps of Engineers, design of hopper dredges, $700,000.	S. Res. 408	94th	122 Cong. Rec. 11050 (1976).
D76-115	Rogers Memorial or Capitol Hill Hospital, $4,000,000.	S. Res. 554	94th	122 Cong. Rec. 32365 (1976).
D76-95	Soil Conservation Service, $18,000,000	H. Res. 1032	94th	122 Cong. Rec. 10553 (1976).
D76-105	Special supplemental food program (women, infants, and children), $61,000,000.	H. Res. 1129	94th	122 Cong. Rec. 10557 (1976).
D76-98	Juvenile Justice and Delinquency Prevention Program, $15,000,000.	H. Res. 1058	94th	122 Cong. Rec. 5503 (1976).
D76-110	Design of Metallurgy Research Center, $688,430	H. Res. 1428	94th	122 Cong. Rec. 27506 (1976).
D78-21	Coast Guard	S. Res. 282	95th	123 Cong. Rec. 36173 (1977).
D77-50	Energy Research and Development Administration, $25,600,000.	H. Res. 305	95th	123 Cong. Rec. 6167 (1977).
D77-51	Energy Research and Development Administration, $5,400,000.	H. Res. 306	95th	123 Cong. Rec. 6168 (1977).
D77-52	Energy Research and Development Administration, biomedical and environmental research.	H. Res. 307	95th	123 Cong. Rec. 6168 (1977).
D78-30	Energy Research and Development Administration, Gas Cooled Thermal Reactor Program, $15,000,000.	H. Res. 851	95th	123 Cong. Rec. 36629 (1977).
D78-33	Energy Research and Development Administration, Fusion Material Test Facility.	H. Res. 852	95th	123 Cong. Rec. 36629 (1977).
D78-34	Energy Research and Development Administration, Magnetic Fusion Energy Program.	H. Res. 853	95th	123 Cong. Rec. 36629 (1977).
D78-35	Energy Research and Development Administration, High Energy Physics Program.	H. Res. 854	95th	123 Cong. Rec. 36629 (1977).

D78-63	Bureau of Reclamation, Garrison Diversion Irrigation Project, $17,700,000.	S. Res. 525	95th	124 Cong. Rec. 25047 (1978).
D79-6	Fishing industry aid, $12,060,000	S. Res. 50	96th	125 Cong. Rec. 4854 (1979).
D79-54	Exploration of National Petroleum Reserve in Alaska, $1,792,000.	H. Res. 239	96th	125 Cong. Rec. 15565 (1979).
D80-57	Youth Adult Conservation Corps, $27,500,000	H. Res. 449	96th	126 Cong. Rec. S8960 (daily ed. June 30, 1980).
D80-65a	Environmental Protection Agency, grants for waste treatment works, $3,647,948,114.	S. Res. 470	96th	126 Cong. Rec. S10532 (daily ed. August 1, 1980).
D80-56	Construction of Cumberland Gap Tunnel, $15,500,000.	S. Res. 464	96th	128 Cong. Rec. S10532 (daily ed. August 1, 1980).
D81-95, D81-96	Veterans Administration, medical care staffing funds, $29,389,000 and $1,690,000.	S. Res. 120	97th	127 Cong. Rec. S5658 (daily ed. June 2, 1981).
D82-193	Office of Juvenile Justice and Delinquency Prevention, $70,000,000.	S. Res. 260	97th	127 Cong. Rec. S15241 (daily ed. Dec. 15, 1981).
D82-236	Department of Energy, Fossil Energy Research and Development, $44,883,000.	H. Res. 411	97th	128 Cong. Rec. H1660 (daily ed. April 29, 1982).
D82-240	Department of the Interior, Historic Preservation Fund, $781,000.	H. Res. 474	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-239	Department of the Interior, Land and Water Conservation Fund, $2,821,000.	H. Res. 475	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-238	Department of the Interior, Urban Park and Recreation grants, $858,000.	H. Res. 476	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-10a	Department of Energy, Strategic Petroleum Reserve, $52,860,000.	H. Res. 479	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-247	Fish and Wildlife Service, land acquisition, $400,000.	H. Res. 493	97th	128 Cong. Rec. H4887 (daily ed. July 29, 1982).
D82-246	Department of the Interior, construction, $600,000.	H. Res. 494	97th	128 Cong. Rec. H4888 (daily ed. July 29, 1982).